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In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL M. LONGIOTTI AND BETTY C. LONGIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners did not qualify for mitigation relief from the statute of limitations because they had not suffered a "[d]ouble disallowance of a deduction" (26 U.S.C. 1312(4)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 819 F.2d 65. The opinion of the district court (Pet. App. 8a-13a) is reported at 635 F. Supp. 840.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1987. A petition for rehearing was denied on June 15, 1987 (Pet. App. 15a). The petition for a writ of certiorari was filed on September 14, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners reported net operating losses (NOLs) on their federal income tax returns for their 1972 through 1974 tax years. The losses incurred in 1973 and 1974 were carried forward to 1976, 1978, and 1979 to offset other income to the extent allowable under Section 172 of the In-

ternal Revenue Code.[1] In 1975, the Commissioner determined that petitioners had not suffered a loss, but instead had earned $559,937 in taxable income in 1972, and he asserted a deficiency of $324,424 for that year. Petitioners sought redetermination of the deficiency in the Tax Court. During the Tax Court proceedings, petitioners did not contend that the 1973 or 1974 NOLs should be carried back to reduce their 1972 taxable income. Ultimately, in October 1979, the parties reached a settlement of the Tax Court case. Pursuant to this settlement, the parties agreed that petitioners had $329,710 in taxable income during 1972 and that petitioners' deficiency was $187,120. The computation did not take into account the 1973 and 1974 NOLs. On December 13, 1979, petitioners' counsel transmitted to the Commissioner a signed stipulated decision reflecting the settlement, and the Tax Court formally entered the agreed decision on January 3, 1980. Pet. App. 2a, 8a-9a.

On December 13, 1979, petitioners' counsel also sent a Form 1045, Application for Tentative Refund, to the Internal Revenue Service Center in Memphis, Tennessee. That application for tentative refund claimed a carryback of all the 1973 NOL and a portion of the 1974 NOL to offset the 1972 deficiency established in the settlement of the tax case. The IRS denied the application for tentative refund on December 31, 1979, because it was not filed within 12 months of the close of the tax year from which the carryback resulted (C.A. App. 77). In June 1980, petitioners filed a claim for abatement in the form of an amended 1972 return based on carryback of the NOLs; the IRS also denied this claim. Pet. App. 9a; C.A. App. 22-24.

Petitioner Samuel Longiotti paid the 1972 deficiency on November 30, 1982. On October 3, 1984, petitioners filed

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.)

an administrative claim for refund of that payment alleging that the 1973 and 1974 NOLs should have been carried back to 1972. By letter dated November 6, 1984, the Commissioner denied petitioners' claim for refund because it was barred by the statute of limitations (I.R.C. § 6511). Pet. App. 9a.

2. Petitioners brought this suit in the United States District Court for the Middle District of North Carolina seeking a refund of their 1972 taxes. Petitioners argued that the application of their 1973 and 1974 NOLs to their 1972 tax year was not barred by the applicable statute of limitations.[2] Alternatively, petitioners argued that they were entitled to relief from the statute of limitations under the mitigation provisions, Sections 1311-1314 of the Code. These detailed provisions establish specific criteria for their application, and the statutory scheme permits relief only when three elements are present: (1) there must be a "determination" as defined in I.R.C. § 1313(a); (2) the determination must fall within one of the "[c]ircumstances of adjustment" described in I.R.C. § 1312; and (3) depending on the particular circumstance of adjustment, the conditions set forth in Section 1311 must be met—here, correction of the error must not have been barred at the time the taxpayer first maintained his position (I.R.C. § 1311(b)(2)(B)). The government maintained that none of these three requirements of the mitigation provisions was met.

The district court granted the government's motion for summary judgment (Pet. App. 8a-13a). The court stated that the mitigation provisions were designed "to protect taxpayers, who, by application of the statute of limita-

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[2] Both the district court (Pet. App. 9a-11a) and the court of appeals (*id.* at 2a-5a) held that the statute of limitations barred petitioners' attempt to carry back the NOLs to 1972; petitioners do not challenge these holdings in this Court (see Pet. i, 5).

tions, would be burdened with a double taxation" (*id.* at 11a). The court held that petitioners' inability to carry back the NOLs did not operate as a double tax (*id.* at 11a-12a).

3. The court of appeals affirmed (Pet. App. 1a-7a). With respect to the application of the mitigation provisions, the court assumed, without deciding, that the statutory requirement of a "determination" was met and that petitioners satisfied the limitations of Section 1311 (Pet. App. 6a). The court held, however, that there was no "circumstance of adjustment" here, as defined in Section 1312. Specifically, the court rejected petitioners' contention that the denial of their refund claim constituted a "[d]ouble disallowance of a deduction" under Section 1312(4) (Pet. App. 5a-7a). The court observed that the determination "did not disallow a deduction which should have been allowed, but was not allowed, in another year. The 'determination,' whether by the Commissioner or the district court, involved only one year—1972" (*id.* at 7a).

ARGUMENT

1. Petitioners' contention that they are entitled to statutory mitigation relief was correctly rejected by the court of appeals. The statutory language is plain; Section 1312(4) establishes as a "circumstance of adjustment" a "[d]ouble disallowance of a deduction," which is defined as a disallowance of a deduction "which should have been allowed to, but was not allowed to, the taxpayer for *another taxable year*" (emphasis added). No such circumstance of adjustment occurred here. Petitioners' attempt to take the NOLs in 1972 was denied because the statute of limitations had run on the 1972 return, but there has never been any plausible claim that these losses should have been allowed to another taxable year. Put another way, the year of the determination and the year of the proposed correction (under the mitigation statute) were the same—1972.

The mitigation statute is addressed to a different situation—namely, when the determination disallows a deduction that should have been allowed in another year; in that case, the mitigation statute affords the taxpayer the opportunity to take the deduction in the proper year despite the expiration of the statute of limitations. See, *e.g.*, *Chertkof* v. *Commissioner*, 649 F.2d 264, 267 (4th Cir. 1981); 2 J. Mertens, *Law of Federal Income Taxation* § 14.01 (rev. 1982 & Supp. 1987); Treas. Reg. § 1.1312-4(b) *Example 1*. Petitioners, by contrast, simply failed to claim the NOLs in 1972 in a timely fashion, even though they concededly had ample opportunity to do so before the statute of limitations expired (see Pet. App. 5a). The mitigation statute was not designed to ameliorate the consequences of such an oversight, and its language does not permit the relief that petitioners seek.

2. Petitoners make little effort to demonstrate that the text of the mitigation statute applies to their claim. Their contention that certiorari is appropriate here rests entirely on the assertion that the decision below conflicts with decisions of other courts of appeals (see Pet. 7-26). This assertion is mistaken.

a. Contrary to petitioners' contention (Pet. 9-15), the decision below is fully consistent with *Olin Mathieson Chemical Corp.* v. *United States*, 265 F.2d 293 (7th Cir. 1959). In that case, Olin claimed an ordinary loss deduction in 1944. The district court affirmed the Commissioner's disallowance of the loss on the ground that it was a capital loss that could be offset only against capital gains. Although it had no capital gains in 1944, Olin did have capital gains in 1945 against which the capital loss could be offset, except that claiming the loss in 1945 was barred by the statute of limitations. The court of appeals held that this situation satisfied the "[d]ouble disallowance of a deduction" requirement even though the loss was claimed as an ordinary loss in 1944 and as a capital loss in

1945.[3] Unlike the instant case, *Olin* involved two separate years—the year of the determination, 1944, and the year barred by the statute of limitations, 1945. Thus, the determination in 1944 satisfied the statutory requirement that the determination disallow a deduction that "should have been allowed to the taxpayer * * * for *another taxable year*" (I.R.C. § 1312(4) (emphasis added)). In this case, by contrast, petitioners seek to achieve through mitigation the precise relief that they were denied in the "determination", namely, the carryback of NOLs to 1972.

Petitioners' claim of a conflict rests on the premise that the Fourth Circuit below held that mitigation is available only when it is determined "that the Year 1 deduction is improper *because* it should have been claimed in Year 2" (see Pet. 12 (emphasis in original)). This premise is incorrect. The court below nowhere suggested that such a causal connection is a prerequisite to mitigation relief. Its opinion plainly shows that the court rejected petitioners' claim simply because it failed to satisfy the clear statutory directive that the "determination" must be made in connection with a different taxable year than the year for which the mitigation relief from the statute of limitations is sought (Pet. App. 6a-7a). Accordingly, the conflict asserted between *Olin* and the decision below does not exist.

b. Petitioners also suggest (Pet. 16-21) that the decision below may conflict with *J.B.N. Telephone Co.* v. *United States*, 638 F.2d 227 (10th Cir. 1981). But this contention rests on the assumption that the court of appeals ruled against petitioners for some reason other than the fact that the determination and the requested mitigation

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[3] The government had argued (see 265 F.2d at 296) that there was no double disallowance of the capital loss because the loss had been allowed as a capital loss in 1944; such a loss provided no deduction, however, because there was no capital gain in that year against which to offset it.

were for the same taxable year. Because the above defect plainly was the basis for the court of appeals' decision, petitioners' alternative claim of a conflict with *J.B.N. Telephone* falls by their own admission. See Pet. 7, 11.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1987

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[4] *J.B.N. Telephone* held that there was no requirement that a new court action be filed in order to obtain mitigation relief; rather, the Tenth Circuit held, mitigation relief could be granted in the same judicial proceeding in which the "determination" is made. The court below did not purport to rule on this point; it assumed that it was appropriate to address petitioners' mitigation claim in this proceeding, and it then proceeded to reject that claim on the merits because of the absence of a "circumstance of adjustment" as defined in I.R.C. § 1312. Thus, to the extent there is already a conflict in the circuits on the issue discussed by petitioners between *J.B.N. Telephone* and *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518 (5th Cir. 1980), and *Benenson* v. *United States*, 385 F.2d 26 (2d Cir. 1976) (see Pet. 21-26), this case presents no occasion to address it.

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